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No. 80-284

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

AMMONETA SEQUOYAH, ET AL., *Petitioners,*

v.

TENNESSEE VALLEY AUTHORITY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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On Petition For A Writ of Certiorari to
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ARGUMENT

In its Brief in Opposition, the respondent raised matters which are misleading as well as incorrect. In this Reply Brief the petitioners seek to clarify the misstatements of respondent.

The brief of respondent did not address the legal claims of the petition but instead avoided addressing the law by contending that the question has already been decided. Respondent essentially asserts that there is no necessity for the Court to consider the constitutional question because the matter of reburial of these Indian "remains" has already been decided by this federal agency. The brief of respondent is most revealing for what it did not say: it did not deny the "Cherokee remains" were retained because of race, but only that the retention of "non-Cherokee skeletal remains ... is not based upon race" (Brief 4); it did not deny that all "remains" of Caucasians and Negro disinterred by the Tellico Project have long ago been reburied. The gravaman of the complaint of the Cherokee is simply that the non-Indians were reburied while Indians were not.

The factual assertions of the respondent are inaccurate. Respondent pointedly quotes from a 1974 letter from the Eastern Band purporting to agree to TVA's plans for reburial (Brief 3) but the brief does not mention that prior to this suit TVA had given petitioners a three day ultimatum to approve disposition of the Cherokee bodies (Plaintiffs' Exhibit LL) or that the 1974 letter was itself insisted upon by TVA under circumstances far from an arm's length transaction:

> This letter was written at the request of TVA and it was my

> understanding that should it not be written that TVA would take no action whatsoever to preserve any Cherokee sites or graves.

(Plaintiffs' Exhibit 00, Affidavit of Principle Chief of Eastern Band.)

Respondent also pointedly referred to the Cherokee Nation, even though that tribe is not a party to the present suit (Brief 3-4). References to the Cherokee Nation are irrelevant to the constitutional claims of petitioners. Respondent infers that the merits of the petition are somehow lessened because another potential party is absent. But a constitutional right is not conditioned upon the number of persons who claim it. The respondent's reference to the petitioner as a "minority" of the Cherokees is an affront to constitutional standards established by the Court, for it would deny constitutional concern to the 15,000 Cherokee Indians represented by these two Cherokee Tribes as well as the three individual Cherokee petitioners merely because they do not constitute a majority of all Cherokee Indian people.

Respondent incredulously asserts that reburial of these bodies has not been denied. This assertion is based solely upon "extensive plans" made by respondent for reburial based upon respondent's "expectation" that the Cherokee remains could be interred sometime after June 30, 1981. Yet nothing in the record or respondent's brief shows the reburial of a single Cherokee Indian body. The prospective promises, especially in light of the holding of many Indian bodies for more than six years, do not cure past and present treatment of Cherokee bodies in stark contrast to other non-Indian bodies.

Respondent even argues that of the 1,140 "skeletal remains" excavated by TVA only 185 were "Cherokee remains" and that the 1,140 remains were "in many instances only fragmentary" (Brief 2-3). Citing no legal authority, the brief distinguishes "bodies" from "remains," presumably in order that this Court treat this petition with less concern because an unspecified number are not "complete skeletons." The constitutional question presented by this petition, however, does not rest upon such archeological niceties.

Respondent specifically denies that its refusal to rebury the non-Cherokee remains is based upon race. This is a factual question which has never been resolved by an evidentiary hearing. For these 955 human remains respondent relies on the Archeological Resources Protection Act of 1979 1/ as a purported justification for its activities, even though respondent has previously argued to both lower courts that no statute restricted the actions of TVA with respect to the Tellico Project because of broad statutory exemptions granted TVA in the Energy and Water Appropriations Act 2/ Since the lower courts ruled that no federal statute could limit the completion of the Tellico Project it is ironic that TVA now seeks justification under the same argument which it previously opposed. Moreover, the respondent omits a significant provision of the Archeological Resources Protection Act by neglecting to point out that the Act requires the "Chairman of the Board of the Tennessee Valley Authority, after consultation with ... Indian tribes," to promulgate "uniform rules and regulations" which "may be promulgated only after consultation of the

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1/ Archeological Resources Protection Act of 1979, 16 U.S.C. (sup. III) 470 aa, et seq.

2/ The Energy and Water Development Appropriations Act, Pub. L. 96-69.

provisions of the American Indian Religious Freedom Act." 3/ (Section 10(a) of the Act.) This consultation, considered in light of the provisions of the Religious Freedom Act, militates against the unrestricted property right argument presented by TVA in its brief.

Petitioners agree that there are importnat federal interests in archeological resources, as indicated by the Archeological Resources Protection Act. However, it is important to insure that this interest is advanced in a non-discriminatory manner and in accordance with accepted notions of human decency. By this petition the Cherokees do not seek to attack the governmental interests behind archeological preservation, but merely to insure that this is done in a racially non-discriminatory manner and to protect the religious and equal protection rights of Cherokee relatives of the disinterred.

The respondent clearly considers itself the "owner" of these human remains, exempt from any statutory or constitutional restriction on its use of these remains of deceased Cherokee Indians. This attitude and resultant treatment of affected American Indians is widespread, 4/ but the question which the courts have not yet addressed is whether the federal government may exercise its alleged "property right" in a racially discriminatory manner.

3/ The American Indian Religious Freedom Act, Pub. L. 95-341, 42 U.S.C. § 1996.

4/ Lawrence Rosen, "The Excavation of American Indian Burial Sites: A Problem in Law and Professional Responsibility," 82 American Anthropologist 5 (1980). Roderick Sprague, "American Indians and American Archeology," 39 American Antiquity No. 1 (Jan. 1974).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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